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9 **IN THE SUPREME COURT**
10 **STATE OF ARIZONA**

11 **IN THE MATTER OF:**

12 } No. R-09-0035

13 **PETITION TO AMEND RULES**
14 **45 AND 84, ARIZONA RULES**
15 **OF CIVIL PROCEDURE**

16 } **RESPONSE TO COMMENTS OF**
17 **MR. CULLINGS AND THE**
18 **MARICOPA COUNTY ATTORNEY**

19 The State Bar of Arizona ("State Bar") hereby responds to the comments to
20 the State Bar's Petition to Amend Rules 45 and 84, Arizona Rules of Civil
21 Procedure ("Petition"), submitted by Casey Cullings of the Arizona Attorney
22 General's Office ("Mr. Cullings' Comment") and Richard M. Romley, Maricopa
23 County Attorney, through Chief Deputy County Attorney Paul W. Ahler ("MCAO
24 Comment") (Mr. Cullings' Comment and the MCAO Comment are collectively
25 referred to as "the Comments"). Although the Comments raise legitimate issues
26 concerning the timing of service of subpoenas, the State Bar does not support the
Comments' suggested modifications to Proposed Rule 45 because: (i) they are
impractical in situations where five days' notice cannot be provided; and (ii) any
benefit the modifications might yield would be outweighed by the likelihood that
they would be abused by recalcitrant witnesses.¹

¹ Unless otherwise indicated, capitalized terms used herein shall have the same meaning as set forth in the Petition.

1 **I. THE ISSUE CONCERNING THE TIMING OF SERVICE OF SUBPOENAS**

2 Mr. Cullings' Comment finds problematic the provisions of Proposed
3 Rule 45(b)(5), which (i) place the burden on the subpoena recipient to file a motion
4 to quash or modify an appearance subpoena, and (ii) require the recipient to appear
5 as directed absent a court order excusing the recipient from compliance.
6 Mr. Cullings notes that these aspects of the Rule can impose serious hardship on a
7 subpoena recipient, particularly when a non-party is subpoenaed one or two days
8 before, or even on the day of, the proceeding at which the appearance has been
9 commanded. Mr. Cullings' Comment at ¶¶ 2 and 3. Mr. Cullings' Comment
10 indicates that this has been a recurring problem for employees of at least one
11 Arizona state agency. Mr. Cullings' Comment, final paragraph ("Employees of the
12 Arizona Department of Agriculture have received subpoenas in the past to appear
13 and testify as non-party witnesses in trials or hearings that were to begin in two
14 days or less."). Mr. Cullings' Comment draws a comparison with other provisions
15 of the Arizona Rules of Civil Procedure in an effort to elucidate the perceived
16 inequity with Proposed Rule 45, suggesting that the parties to litigation are afforded
17 greater protection throughout the course of litigation than a non-party subject to a
18 subpoena. Mr. Cullings' Comment at ¶¶ 4-5.

19 The MCAO Comment appears to echo the concerns identified in
20 Mr. Cullings' Comment. MCAO Comment at 2:10-12 ("[A] third party, who has
21 no stake in the litigation, may have less time to respond to a deposition subpoena or
22 a subpoena duces tecum than a party to the lawsuit would have to a deposition
23 notice or request for production of documents."). And the MCAO Comment
24 expressly states that the practice of "last-minute" subpoena service is on the
25 increase. MCAO Comment at 2:17-19 (expressing concern for "the increasingly
26

1 frequent practice of last-minute subpoenas that make it difficult or impossible to
2 respond on a timely basis.”).

3 The State Bar does not dispute that the Comments raise legitimate concerns.
4 Indeed, problems relating to the timing of service of subpoenas, and of the process
5 for objecting to subpoenas—particularly appearance subpoenas—were the subject
6 of much debate and consideration within the State Bar, including at the State Bar’s
7 Civil Practice and Procedure Committee and the State Bar Board of Governors
8 Rules Committee, over the two-year period prior to the filing of the Petition. As is
9 discussed below, however, Proposed Rule 45 is no different from the current Rule
10 in providing that a subpoena recipient must appear as commanded in the subpoena
11 unless the recipient obtains a court order excusing the appearance. Moreover, as is
12 also discussed below, the Comments’ proposals are impractical and may have the
13 unintended consequence of encouraging potential witnesses to avoid appearing at a
14 hearing or trial.

15 II. RESPONSE TO THE COMMENTS’ CONCERNS

16 A. **Proposed Rule 45 Does Not Represent a Sea Change** 17 **in Current Requirements.**

18 At the outset, it should be noted that Proposed Rule 45(b)(5) does not
19 fundamentally alter how appearance subpoenas are treated under, or impose
20 additional burdens not already required by, Rule 45 as currently in effect.
21 Rule 45(c)(3)(A) currently provides:

22 (3)(A) *On timely motion*, the superior court of the
23 county in which the case is pending or from which a
24 subpoena was issued shall quash or modify the subpoena
if it

25 (i) fails to allow reasonable time for
26 compliance;

1 (ii) requires a person who is not a party or an
2 officer of a party to travel to a place other than the
3 county in which the person resides or transacts
4 business in person or is served with a subpoena, or
5 within forty miles from the place of service, or such
6 other convenient place fixed by an order of court,
7 except that, subject to the provisions of clause
8 (c)(3)(B)(iii) of this rule, such a person may in order
9 to attend trial be commanded to travel from any such
10 place within the state, or

11 (iii) requires disclosure of privileged or other
12 protected matter and no exception or waiver applies,
13 or

14 (iv) subjects a person to undue burden.

15 (Emphasis added.) At a minimum, the phrase “On timely motion” implies that a
16 motion to quash or modify must be filed *prior* to the date upon which the
17 appearance has been commanded in order to be excused from compliance with the
18 subpoena; otherwise, the Rule would simply read “On motion.” Thus, in its current
19 form, Rule 45 already requires the subpoena recipient to attend and give testimony
20 in the absence of the timely filing of a motion to quash or modify *and* a court order
21 excusing compliance. And the current consequence for failing to comply “without
22 adequate excuse” is the possibility of being held in contempt. *See* Rule 45(e). As
23 noted in the MCAO Comment, case law supports this construction of the current
24 Rule. MCAO Comment at 2:2-7 (citing *Jolly v. Superior Court (S. Pac. Transp.*
25 *Co.)*, 112 Ariz. 186, 189, 540 P.2d 658, 661 (1975) (“In order to be relieved of the
26 responsibility of complying with a properly issued subpoena duces tecum,^[2] it is
necessary that court approval be obtained.”)).

² The subpoena duces tecum issued in *Jolly* required the recipient to appear and give testimony at a deposition. *Jolly*, 112 Ariz. at 188, 540 P.2d at 660.

1 Proposed Rule 45 makes explicit what is at least implicit in the current Rule.
2 See Proposed Rule 45(b)(5) (“Objections to a subpoena commanding a person to
3 attend and give testimony at a hearing, trial, or deposition shall be made by timely
4 motion in accordance with Rule 45(e)(2).^{3]} Unless excused from doing so by the
5 party or attorney serving a subpoena, by a court order, or by any other provision of
6 this Rule, a person who is properly served with a subpoena is required to attend and
7 give testimony at the date, time and place specified in the subpoena.”). In addition,
8 Proposed Rule 45 goes one step further and defines what it means to “timely” file a
9 motion to quash or modify—a definition which does not exist in the current Rule.
10 See Proposed Rule 45(e)(2)(D) (“A motion to quash or modify a subpoena must be
11 filed before the time specified for compliance or within 14 days after the subpoena
12 is served, whichever is earlier.”).

13 One of the goals sought to be achieved by Proposed Rule 45 is to “clarify
14 ambiguities in the Rule *while maintaining its substantive integrity*.” Petition at
15 1:14-15 (emphasis added). The State Bar submits that Proposed Rule 45 maintains
16 the substantive integrity of current Rule 45 with regard to the issues raised by the
17 Comments.

18 **B. Practical Considerations**

19 The State Bar acknowledges that Proposed Rule 45 cannot possibly cover
20 every conceivable situation dealing with the service of subpoenas. The State Bar
21 believes, however, that the suggested modifications proposed in Mr. Cullings’
22 Comment and the MCAO Comment would be impractical and would lead to
23 unintended consequences that would undermine the interests of justice.

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25
26 ³ The provisions of Proposed Rule 45(e)(2) parrot current Rule 45(c)(3)(A), quoted above.

1 Mr. Cullings' Comment suggests allowing a subpoena recipient who is
2 "served less than five days before the time specified for compliance" to be absolved
3 from compliance by simply serving a letter objection on the party or attorney
4 causing the subpoena to be served. Mr. Cullings' Comment at ¶ 7. Similarly, the
5 MCAO Comment suggests allowing the filing of a motion to quash or modify a
6 subpoena served less than five days before the time specified for compliance to
7 suspend the recipient's obligations pending a court order. Certain situations,
8 however, may make it impossible to serve subpoenas more than five days before
9 appearance is required—e.g., evidentiary hearings on orders to show cause,
10 temporary restraining orders, preliminary injunctions, and other emergency and
11 provisional remedies, or service on a witness intentionally dodging service.
12 Adopting the suggested revisions in the name of convenience also would create an
13 avenue encouraging non-compliance, particularly for the unwilling, and place in the
14 hands of the subpoena recipient the ability to frustrate the "just, speedy and
15 inexpensive determination of every action." Ariz. R. Civ. P. 1. Anyone who
16 wished to avoid an appearance could do so merely by delivering a letter (under
17 Mr. Cullings' proposal) or filing a motion (under the MCAO proposal) the evening
18 before the scheduled appearance. Simply stated, the pursuit of justice is not always
19 convenient; and making it easier to avoid having to appear may well lead to the
20 abuse of the Rule and the loss of valuable testimony essential to the fair
21 adjudication of disputes.

22 Mr. Cullings' Comment makes a further proposal, in which the MCAO
23 Comment joins, that Proposed Rule 45(f)—the contempt provision of the Proposed
24 Rule—should include an exemption from contempt for those persons compelled "to
25 attend without allowing a reasonable time for compliance. . . ." Mr. Cullings'
26 Comment at ¶ 7. On initial review, this suggestion would appear to be attractive

1 and might resolve some of the concerns raised in the Comments. There is,
2 however, a qualitative distinction between the exemption currently provided in
3 Rule 45(e) and that set forth in Proposed Rule 45(f), which relates to persons
4 subpoenaed to appear outside of set geographical limitations, and the proposed
5 exemption for those who have not been given “reasonable” time for compliance.
6 Geographic limitations are objectively quantifiable; “reasonable” time for
7 compliance is not objective, is wholly dependent upon the circumstances, and is
8 subject to the courts’ determination.

9 Rule 45 contains, and Proposed Rule 45 retains, the edict that “[a] party or an
10 attorney responsible for the service of a subpoena shall take reasonable steps to
11 avoid imposing undue burden or expense on a person subject to that subpoena.”
12 Rule 45(c)(1); Proposed Rule 45(e)(1). The Rule and Proposed Rule further
13 provide that the courts “may” exercise contempt powers against those who have
14 failed to comply absent adequate excuse. Rule 45(e); Proposed Rule 45(f).
15 Contempt is not a foregone conclusion, *even if* an adequate excuse is not supplied.
16 Moreover, a court presumably would not hold a subpoena recipient in contempt for
17 failing to comply if the court would have been required to quash the subpoena for
18 failing to give a reasonable time for compliance in the event a motion to quash or
19 modify was timely filed. In other words, under the current and proposed rules, the
20 failure to comply would constitute an “adequate excuse” so long as it can be shown
21 that the time given for compliance was unreasonable under the circumstances.
22 Proposed Rule 45 simply makes compliance the rule, not the exception.

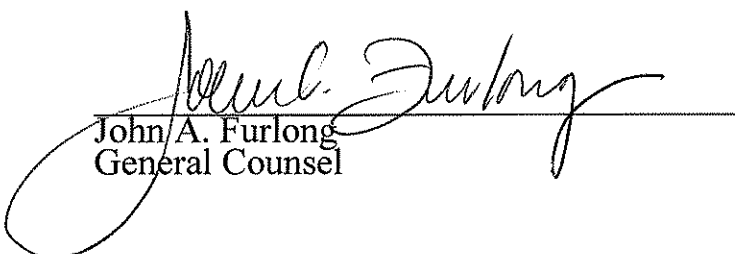
23 While the experiences related in Mr. Cullings’ Comment are regrettable and
24 likely the result of ill-prepared lawyers or parties, the court’s ability to compel
25 action through the subpoena power should not yield to the inconvenience of a non-
26 party witness unless the court has been given the opportunity, through a specifically

1 defined process, to determine the relative burdens—i.e., the burden on the pursuit
2 of justice versus the burdens on non-party witnesses—after consideration of the
3 totality of the circumstances. The trial judges in the courts of this state are well
4 equipped to recognize when, under the circumstances, a reasonable amount of time
5 has not been given to respond to a subpoena, and when contempt sanctions are truly
6 warranted. The State Bar submits that Proposed Rule 45 recognizes this discretion
7 and allows the trial courts to reliably and effectively administer justice.

8 III. CONCLUSION

9 For the foregoing reasons, the State Bar does not support the Comments'
10 suggested modifications to Proposed Rule 45 and respectively requests the Court to
11 amend Rules 45 and 84 of the Arizona Rules of Civil Procedure as set forth in
12 Exhibits "A" and "C" to the Petition.

13 RESPECTFULLY SUBMITTED this 15th day of June, 2010.

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15 
16 John A. Furlong
17 General Counsel

18 Electronic copy filed with the
19 Clerk of the Supreme Court of Arizona
20 this 15th day of June, 2010.

21 By: Kathleen Lundgren
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